Supreme Court, U.S.
FILED
FEB 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,

Petitioners,

v.

HARZA ENGINEERING COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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February 12, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONERS' REPLY BRIEF

I.

Respondent (Harza) seeks to persuade the Court that there is no conflict between the decision below and the decisions of the Second and Fifth Circuits, but it does not address the decisions of those courts.

None of those decisions turns on the "relationship" between the *creditor* and the *United States*. In fact, in many of the opinions the nature of that relationship is not even disclosed. Instead, in *each* of the cases the

court, after carefully reviewing the precedents and the purposes that underlie the Act of State Doctrine, zeroes in on the relationship between the *debtor* and the *foreign state*.

In view of Harza's artful effort to redefine (and make unrecognizable) our position on this point, we state that position again:

Where a foreign state expropriates without compensation an item of intangible property (such as a debt), the act should be recognized by a United States court only if the foreign state was able to convert the property to a tangible form (such as cash) within its own territory. The foreign state would not be able to do so if, as was the case here, the debtor was not present and had no assets in that state at the time of expropriation. In such a case, the situs of the intangible property is said to be where the debtor's assets can be reached.

Harza's Brief in Opposition never refers to this rule of law. It does not deny that the decision of the lower courts would have to have been different had this rule of law been applied. Most important, Harza never squarely recognizes the conflict between this traditional rule and the test applied by the Seventh Circuit in this case. Instead, it attempts to distinguish this case from the decisions on which we rely based on factors that played no role in those decisions.

Harza first points to the fact that most of the services that gave rise to the debt in this case were performed by petitioner (the creditor) outside the United States.[1] This, says Harza, makes this case different from those

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[1] The Ninth Circuit in *Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333 (9th Cir. 1985), had also pointed to such facts in reaching the bewildering conclusion that Iran was *therefore* able effectively to seize a debt owed to the creditor by an American company. *Id.* at 1338.

that involved "a bank account, a fund, or funds being held in the United States," (Br. Opp. 11). This distinction seems to be based on Harza's view that such an account or fund is a physical object situated in the United States, which of course is not correct: A bank account or other "fund" is merely a debt.[2] Moreover, Harza cannot point to *any* language in *any* of the Second or Fifth Circuit cases which would make such a distinction relevant; indeed, in one case the court specifically noted that the debt owed to the appropriated Cuban company arose "out of a Cuban transaction," *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 713 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). Nor does Harza ever explain how the relationship between the creditor and the United States helps to determine when to apply the Act of State Doctrine. That Doctrine, after all, is generally traced back to this 1897 statement in *Underhill* v. *Hernandez*:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another *done within its own territory.*"

168 U.S. 250, 252 (1897) (emphasis added). In the well-known *Sabbatino* decision, the Court quoted this very language, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964), and elsewhere set forth the same concept in its own words:

> "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power *committed within its own territory.*"

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[2] *See Vladikavkavsky Ry.* v. *New York Trust Co.*, 189 N.E. 456, 459, 263 N.Y. 369 (N.Y. 1934).

> ". . . the Judicial Branch will not examine the validity of a taking of *property within its own territory* by a foreign sovereign government . . ."

Id. at 401, 428 (emphasis added). Just in the last few weeks this concept was reaffirmed by a unanimous Court:

> "The act of state doctrine . . . merely requires that, in the process of deciding, the acts of foreign sovereigns *taken within their own jurisdictions* shall be deemed valid."

W. S. Kirkpatrick & Co. Inc. v. *Environmental Tectonics Corp., Int'l.*, 58 U.S.L.W. 4140, 4143 (U.S. Jan. 17, 1990) (No. 87-2006) (emphasis added).

It is therefore plain that the question is not whether the acts of the *creditor* were carried out outside the United States, as Harza and the lower court seem to believe, but whether the act of the *foreign state* was completed in *its* territory The expropriation of a debt cannot be completed within the expropriating state's territory, if, as in this case, the debtor has no assets there. Therefore, the expropriation should not be recognized, and the case should go forward, inasmuch as the "courts in the United States have the power, and ordinarily the obligation, to decide cases properly presented to them." *Kirkpatrick*, 58 U.S.L.W. at 4143.

Harza attempts to harmonize the decision below with decisions of other circuits by relying on Judge Posner's declaration that "the interest which underlies the extraterritorial exception to the act of state doctrine" is the interest in protecting "property and transactions . . . within [United States] borders." (Pet. App. 11a, quoted at Br. Opp. 13)

But Harza and the lower court are in error.

Let us suppose that the petitioner Firm had owned a building in Brazil and that the Iranian government had purported to expropriate that asset as well. Even if

there were no relevant transactions within United States borders, there is no question that the courts of the United States would not be required by the Act of State Doctrine to give effect to that expropriation. The Act of State Doctrine would be inapplicable because the property Iran attempted to seize was not "property within its own territory," *Sabbatino*, 376 U.S. at 428. It is thus clear that a lack of connection between the United States and the transaction in question is not, and never has been, a necessary element of the territorial limitation contained in the Act of State Doctrine, and Judge Posner was in error in making it the dispositive criterion.

It may be that there are other doctrines or principles under which a court of the United States would decline to hear a case involving the expropriated Brazilian property of a foreign national. Concepts such as *forum non conveniens* come to mind. Judge Posner seemed to think that the Act of State Doctrine was another such principle of abstention, one that permits the court to decline to entertain a case when the judge decides that the "American interest" is too "attenuated." (Pet. App. 10a) But this Court has now made it crystal clear that "[t]he act of state doctrine is *not some vague doctrine of abstention* but a '*principle of decision* binding on federal and state courts alike.'" *Kirkpatrick*, 58 U.S.L.W. at 4142 (quoting *Sabbatino*) (first emphasis added; second emphasis in the original).[3] In that case, the Court rejected an at-

[3] Judge Posner's view of the Doctrine as a principle of abstention is also suggested by his apparent belief that his holding would reduce the number of such cases that "pop up" in United States courts. (Pet. App. 10a) But where, as here, the debtor is an American company with no asssets in the expropriating state, the claim is bound to "pop up" in the United States courts one way or another, whether it is brought by the perpetrator of the expropriation or its victim (unless, of course, the debtor is to enjoy a windfall). The only difference would be that, if Iran were to bring this suit, Harza would undoubtedly be relying on the decisions of the Second and Fifth Circuits to argue that Iran was not the rightful owner

tempted "expansion of the act of state doctrine . . . into new and uncharted fields," *id.* at 4143. In this case, Harza also urged such an "expansion," and this attempted expansion should have been rejected by the lower courts.[4]

Harza devotes much of its brief to showing that the Act of State Doctrine cannot be held inapplicable simply because the "debtor or defendant" is an American company. (Br. Opp. 13-15) It says that such a holding would render the Doctrine a nullity. (Br. Opp. 13-14)

The Act of State Doctrine would, of course, be meaningless under such an assumption. But even Harza recognizes that "[p]etitioners do not argue" this. (Br. Opp. 14) Our position, and that of the Second and Fifth Circuits, is that the Doctrine is inapplicable if the expropriating state was not in a position to convert the debt at issue into cash within its own territory. In other words, the impact of the Doctrine cannot be avoided here by showing only that Harza is a United States entity that can be sued in this country; the dispositive fact is that Harza was not present and did not have assets within the territory of Iran at the time of the expropriation. The Second and Fifth Circuit cases on which we rely make that perfectly clear, as the Petition plainly states (Pet. 8-10). We made such a showing, and Harza does not even say, let alone show, otherwise.

Harza argues that the Act of State Doctrine is a "fluid" one that should be applied "pragmatically and flexibly, with reference to its underlying considerations." (Br. Opp. 15, quoting from *Tchacosh*). It is of course true, as the Court said very recently, that "the policies

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of the property at issue here. One way or the other, a United States court would have to determine whether the asset belongs to petitioners or to Iran.

[4] On this point, the conflict between *Kirkpatrick* and the lower court's decision in this case is so clear that the Court may wish to vacate and remand for further consideration in light of *Kirkpatrick*.

underlying the act of state doctrine may not justify its application" in a particular case, *Kirkpatrick*, 58 U.S.L.W. at 4143. This "flexibility" may thus warrant a *narrowing* of the Doctrine, but not its broadening. No court prior to *Tchacosh* had ever broadened the Doctrine, as the Seventh Circuit did here, by determining that the key "underlying consideration" is whether the case has a stronger "nexus" to the United States than to the expropriating country. (Br. Opp. 15-16) The threshold issue under the Doctrine is whether the foreign state expropriated "property within its own territory," *Sabbatino*, 376 U.S. at 428. The view of the Ninth and Seventh Circuits—that the lack of a "nexus" between the creditor's activities and the United States calls for application of the Doctrine—is squarely in conflict with the test that has been followed at least since 1965, when Judge Friendly wrote for the court in *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Under that test—did Harza have assets in Iran to which the expropriation could apply?—a very different result would have been produced in this case.[5] That result would have been far more consistent with the recently reaffirmed principle that the "[c]ourts in the United States have the power, and ordinarily the obligation, *to decide cases* properly presented to them," *Kirkpatrick*, 58 U.S.L.W. at 4143 (emphasis added).

II.

The second contention in our Petition was that this Court should reverse the Seventh Circuit's failure to seek the views of the Executive Branch before deciding that

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[5] As we pointed out (Pet. 2-3 & n.1), there were some disputes of fact which the lower courts—contrary to unimpeachable authority—resolved in favor of Harza, despite the fact that it was the party that moved for summary judgment. However, because the facts regarding "relative nexus" are not material, we do not comment on respondent's charge that our petition "distorts" the record or its claim that its version of the "facts" was found to be "undisputed" by both courts below.

to entertain this private contract dispute would be "a slap in the face of Iran" and thus would injure the foreign relations of the United States. Harza does not take issue with the merits of our position, and of course Harza cannot deny that the United States explicitly supported this position in its *amicus* brief in *Kirkpatrick*.[6]

Harza makes only one point on this question: that the issue was not properly raised below. Harza does not contend that this point is *jurisdictional* or that this Court is somehow barred by its rules from considering petitioners' argument. Nor does Harza deny that the court of appeals was aware of our position that it should seek the views of the Executive Branch. Instead, Harza relies exclusively on two cases that relate to the circumstances under which a court of appeals will consider an argument raised for the first time on appeal.

This is indeed a curious position.

The principal case Harza cites, *Singleton* v. *Wulff*, 428 U.S. 106 (1976), expressly holds that there is "no general rule" regarding when an appellate court may take up for the first time an issue not raised below and that such matters are left "primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121. Harza also notes that *Singleton* cited the *Hormel* v. *Helvering* decision, 312 U.S. 552 (1941) (Br. Opp. 17), in which this Court *upheld* the appellate court's decision to consider an argument first raised on appeal, observing that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them," 312 U.S. at 557.[7] In this

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[6] The Court did not consider this issue in *Kirkpatrick* because the lower court there had sought the views of the Executive Branch before deciding the Act of State issue.

[7] Courts of appeals properly consider arguments first raised on appeal in at least three kinds of cases:

—when the argument in question "'. . . is purely one of law and . . . does not affect or rely upon the factual record

case, the issue was raised below—twice—and "the ends of justice" would not be promoted by refusing to consider it merely because it was not contained within the four corners of our briefs.

Moreover, even if the issue had never been presented to the court of appeals, this Court has on numerous occasions considered such issues, especially if they are "purely legal" ones. *See, e.g., Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980). This is particularly the case where the issue is whether a prior decision of this Court should be overruled. *E.g., Blonder-Tongue Lab., Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971). That is this case. We are contending that the Court should adopt a rule it declined to adopt in *Sabbatino*, namely, that a court should never refuse to hear a case on the ground that doing so would interfere with the foreign relations of the United States unless it has first received the views of the Executive Branch on that point.

Harza makes no effort to deal with the implications of its claim that this issue is not properly before the Court,

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developed by the parties'," *Hansen* v. *Morgan*, 582 F.2d 1214, 1217 (9th Cir. 1978), quoting *United States* v. *Patrin*, 575 F.2d 708, 712 (9th Cir. 1978); *Foster* v. *United States*, 329 F.2d 717, 718 (2d Cir. 1964).

—when the matter involves important questions of public policy, *Olegario* v. *United States*, 629 F.2d 204, 216 n.8 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *Green* v. *Brown*, 398 F.2d 1006, 1009 (2d Cir. 1968).

—when "injustice might otherwise result," *Hormel* v. *Helvering*, 312 U.S. at 557.

It requires no discussion or analysis to see that the present case fits into all three of these categories: whether a court should determine that adjudicating the case before it will interfere with the foreign relations of the United States is purely a question of law, it is of considerable public importance, and injustice would surely result if this Court should fail to address the question in this case.

and it is obvious why it has not done so after one considers the fallacy of its position.

Thus, the matter is ripe for disposition by this Court.

CONCLUSION

The Court should grant the petition and set the case down for briefing and argument or vacate the decision below and remand for further consideration in light of *Kirkpatrick*.

Respectfully submitted,

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